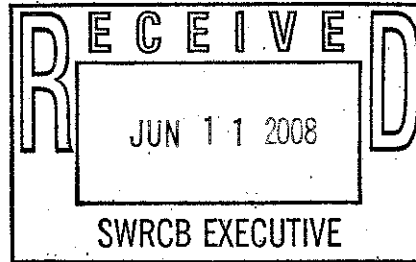


Office of the City Manager

June 11, 2008

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Subject: City of San José Comments on the Draft Construction General Permit

Dear Ms. Townsend and Members of the Board,

Thank you for the opportunity to provide comments on the Draft Construction General Permit dated March 18, 2008.

The City of San José serves a community of nearly one million residents in an area that is home to the largest concentration of technology expertise in the world. San José has long been an active steward of the environment, our local creeks, and the San Francisco Bay that identifies the region. In 2007, San Jose's City Council unanimously adopted a Green Vision which sets forth a bold set of specific goals for advancements in environmental protection in our community. The Green Vision includes a number of objectives important to the Water Board's mission such as green buildings, sustainable development, and trail development. With that vision, San José integrates environmental protection into its services and operations as a comprehensive approach to fostering sustainability.

A core function of the City is the construction and maintenance of infrastructure and facilities. As part of this function, we build parks, libraries, community centers, fire stations, roads, sewers, and the like. With a five-year capital improvement program of approximately \$730 million, the City itself is the largest builder in the community. The Draft Construction Permit marks a substantial shift in the regulation of stormwater discharges and would have a significant impact on the City's ability to effectively manage its infrastructure.

The City has a General Plan and very progressive smart growth and environmental protection policies to drive how development looks in San Jose. The provision of affordable housing and industry jobs, many in support of clean technology, is critical to allow the City to support the local and State economy and provide services to support our citizens, the community, and the environment. The requirements of the Draft Permit would impact this private development in cost and time, just as it would public projects.

We support the goals of the State to protect water quality and promote low impact development. However, we have concluded that this Draft Permit does not provide the framework to achieve

those goals in a practicable manner. The City respectfully requests that the Water Board consider our input to help develop a Permit that is protective, practical, and based on technically sound principles, and takes into account the need to evaluate benefits with respect to cost and the balance of other service demands on the City.

Key concerns and issues related to the Draft Permit are briefly summarized in this letter and more detailed comments are provided in Attachment A. San José is also submitting legal comments on the Draft Permit from our City Attorney's Office separately. In addition, we support the comments submitted by the California Stormwater Quality Association (CASQA) and the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP), as well as the comments of the California Building Industry Association (CBIA) provided at the June 4 State Board workshop.

The City is most concerned with the following aspects of the Draft Permit:

- **Shift in Regulatory Approach** – The Draft Permit denotes a fundamental shift in regulatory approach from an iterative BMP-based approach to a numeric limit-based approach without addressing concerns expressed by Blue Ribbon Panel. San José recommends that the Panel's concerns be addressed and that numeric limits be considered as a phased approach with limits that are tested, scientifically-sound, and within the capacity of dischargers.
- **Monitoring Requirements** – The effluent monitoring requirements are excessive, in part because the risk assessment methodology is weighted toward the higher risk categories. In particular, the bioassessment and receiving water sampling requirements have limited nexus with individual project sites. San José recommends the monitoring requirements of this permit be directly related to construction sites, and that the Water Board's objectives for receiving water monitoring be redirected through a separate, comprehensive program.
- **Economic Analysis** – the Draft Permit documents provide insufficient analysis of the economic impacts of this regulation. San José requests that a comprehensive economic analysis be conducted so that decision makers and dischargers understand the aggregate impact of the proposed requirements. Such an analysis would include the cost of monitoring equipment and services, additional staffing, and training; the cost of construction delays caused by the uncertainties of permit coverage created by the Draft Permit; and the escalation of construction costs as more sites concentrate activities during the dry season.
- **Open-ended Comment Period** - The Draft Permit provides for an open-ended opportunity for comment which could prompt Water Board staff to suspend coverage for an indefinite period. This could expose projects to unwarranted project delays and financial impacts. San José recommends that the public participation and comment period have a defined timeframe and that the Regional Boards be given guidelines on how to respond to input when exercising their authority related to permit coverage.
- **Implementation Timeframe** - Lack of grandfathering in the Draft Permit would create an impracticable timeframe for public projects to comply with the new order. One-hundred

days is not nearly enough time for a large municipality to modify the necessary processes, adjust budgets, update SWPPPs, and qualify staff per Permit requirements. San José recommends that projects with filed NOIs under the current permit, Order 99-08, should retain coverage under that order. Given the complexity and duration of municipal budgeting processes, we also request that public projects funded within the next two years of the adopted capital budget be grandfathered.

San José acknowledges the time and effort of Water Board staff that went into the production of the Draft Permit and we appreciate your consideration of our comments. In light of the significant technical and practical challenges of developing a Permit that effectively and fairly regulates construction stormwater runoff, we request that the Water Board plan additional workshops and produce a revised Draft Permit for public review and comment. We believe that a Permit can be developed that meets Water Board goals and is mutually beneficial, acceptable, and feasible to implement and we look forward to continued cooperation toward this goal.

Sincerely,



Ed Shikada
Deputy City Manager

Attachment A: San José Detailed Comments on Draft Construction General Permit

**Attachment A
City of San José Detailed Comments on Draft Construction General Permit**

Draft Permit Element	Location	Comment
1. Permit Implementation Timeframe	Permit Section VI	Lack of grandfathering in the Draft Permit would create an impracticable timeframe for project compliance. San José recommends that projects with filed NOIs under the current permit, Order 99-08, should retain coverage under that order. Additionally, one-hundred days is not nearly enough time for a large municipality to modify the necessary processes, adjust budgets, update SWPPPs, and qualify staff per Permit requirements. Given the complexity and duration of municipal budgeting processes, we request that public projects funded within the next two years of the adopted capital budget be grandfathered.
2. Economic Analysis	Fact Sheet p.52	The proposed Draft Permit would increase the cost of managing stormwater at project sites by a factor of six to eleven, relative to the current permit, according to an economic analysis conducted in Ventura County. In light of the magnitude of impact, the Draft Permit provides insufficient analysis of the economic impacts of this regulation. San José requests that a comprehensive economic analysis be conducted so that decision makers and dischargers understand the aggregate impact of the proposed requirements. Such an analysis would include the cost of monitoring equipment and services, additional staffing, and training; the cost of construction delays caused by the uncertainties of permit coverage created by the Draft Permit; and the escalation of construction costs as more sites concentrate activities during the dry season.
3. Projects Covered	Fact Sheet II.B	The Draft Permit is written for traditional "box" type construction projects and is ill-suited for linear projects. Use of this Permit to regulate linear construction is not reasonable and would present impractical and costly challenges to the City's ability to comply. These projects should retain coverage under the current General Construction Permit (Order No. 99-08) until the Small Linear Underground Permit (SLUP) can be revised to include all linear construction projects, or the SLUP should be immediately amended to include them. The definition of linear projects should be revised to include street widening within the existing right of way, pedestrian/bicycle trails and linear projects which disturb more than 5 acres.

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City of San José Detailed Comments on Draft Construction General Permit

	Draft Permit Element	Location	Comment
4.	Common Plan of Development Definition	Fact Sheet II.B	<p>The construction activities related to a roadway resurfacing project that is managed by a Capital Improvement Plan do not differ from those projects that are managed by General Fund programs. San José holds that both would be reasonably exempted from this permit as routine maintenance. Please provide clarification as to why the Draft Permit creates different standards based on funding programs.</p> <p>The following are examples which demonstrate why the Draft Permit is not a good fit for linear projects:</p> <ul style="list-style-type: none"> • Risk Evaluation (Attachment A): The current risk evaluation asks for a single value to be entered for each of the sediment risk factors (rainfall, soil types and slope gradients and lengths). A linear project may cross many soil types, rainfall areas and even watersheds so how can this calculation determine a meaningful risk factor? • Sampling in all drainage areas: A linear project could stretch over many miles and multiple drainage areas. This would require sampling at dozens of points across a linear project. Compliance would be infeasible, very costly and yield no meaningful data. • Receiving Water Monitoring: By the same token, a linear project could cross multiple watersheds and thus discharge to multiple receiving waters. As with the sampling requirement discussed above, compliance with this requirement would be impractical, very costly and yield no meaningful data. • Numeric Effluent Limitations: Most linear projects, because they consist of a narrow area of construction over a long distance, have little or no control over the site run-on? and typically don't change the existing slope of the terrain. Therefore, if runoff and runoff are calculated, most of the discharge would be associated with surface runoff and drainage from areas other than the actual disturbed area of construction. The calculations serve no meaningful purpose. <p>The definition of common plan of development should not include Capital Improvement Projects (CIP). Included in the City's CIP program are many maintenance and other types of projects that are normally exempt from coverage under</p>

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5. Legally Responsible Person (LRP) & Electronic Filing		<p>the General Construction permit. They should remain exempt.</p> <p>Where is this provision in Draft Permit? A large jurisdiction such as the City of San José manages hundreds of projects simultaneously. Numerous LRPs will be needed to manage the reporting and filing requirements associated with the Draft Permit.</p> <p>The Draft Permit and Fact Sheet are missing significant amounts of information related to electronic permit filing. The May 21, 2008 workshop included an overview of the requirements and the State Water Resources Board website does include some reference information. However, the information is difficult to follow and does not provide the level of detail required to understand the system.</p> <p>Additionally, stakeholders should be provided with the opportunity to review the electronic filing requirements and provide the State Board with comments and questions related to each local agency's organizational limitations. For example, a large municipality like San José would require significantly more flexibility in regards to who may enter and submit the required data for municipal projects.</p>
6. Water Board Role	Permit Section I.6 & XII	<p>The Draft Permit requires the RWQCB to enforce the Permit provisions and describes the RWQCB authorities. However, the Draft Permit does not provide any specific criteria, parameters, or guidelines for enforcement. Each region should be evaluated consistently. In addition, the actions allowed to be taken by the RWQCB include rescinding permit coverage and requiring public hearings. The RWQCB should be provided with direction as to when and why a permit should be rescinded or a public hearing should be required. It should be noted that all private and public projects are required to comply with public hearing requirements prior to starting construction (whether through the environmental clearance process, permit approval, or award of a public project). As an example, one violation should not qualify a project for public hearing or allow the board to rescind the permit. RWQCBs should be provided with criteria for compliance timelines and requirements. Otherwise, how can projects predict potential delays or financial effects related to compliance with the permit?</p>

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Draft Permit Element	Location	Comment
7. Delegation of Oversight	XII	<p>The Draft Permit does not provide the RWQCBs with criteria for projects that may require separate permits from the Regional Water Board. These criteria should be consistent for all regions in the state.</p> <p>The Draft Permit is not specific enough in regards to the Regional Water Board's oversight and enforcement role, leaving the impression that oversight and enforcement duties might at some point be delegated to municipalities. San José would oppose such delegation and requests clarification in the Permit regarding oversight and enforcement duties.</p>
8. Open-ended Comment Period	XII	<p>The Draft Permit provides for an open-ended opportunity for comment which could prompt Water Board staff to suspend coverage for an indefinite period. This could expose projects to unwarranted project delays and financial impacts. San José recommends that the public participation and comment period have a defined timeframe and that the Regional Boards be given guidelines on how to respond to input when exercising their authority related to permit coverage.</p>
9. Risk Assessment	Attachment A	<p>While we appreciate the benefits of a risk-based approach to protecting water quality, the assessment matrix in the Draft Permit is overly complex and needs further study and beta testing to ensure the accuracy and fairness. The current risk assessment methodology is significantly weighted toward the higher risk categories.</p> <p>The Sediment Risk Worksheet should provide appropriate incentives to dischargers who implement less risky construction practices, such as reducing size of area disturbed during rainy season. This worksheet should also take the disturbed area into account, as mentioned in the fact sheet.</p> <p>The Receiving Water Worksheet appears to assign a baseline score of 10 points, making it impossible for any project to receive a low-risk rating. The baseline should be 0.</p> <p>Receiving Water Worksheet does not seem applicable for projects where the receiving water is an engineered channel. Additional information and guidance is needed to</p>

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Draft Permit Element	Location	Comment
		<p>complete the channel stability_risk_factor assessment.</p> <p>The term "sensitive receiving water" needs clarification in the Receiving Water Worksheet, Items B1 and B3. CASQA's solution to define sensitive receiving water as a water body on the 303d list for sediment related pollutants makes sense. Receiving Water Worksheet, Item B.4 provides credit only if all runoff from a project is treated when in reality, it is often practicable to only treat disturbed areas through ATS. Credit should be made available when runoff from disturbed areas is appropriately treated.</p>
10. REAP/SWPPP Requirements	Permit X.2	<p>The risk assessment process is especially complex and difficult to apply to redevelopment projects. In addition, if existing projects are required to comply with the new order, the risk assessment process should be replaced with a phase-in period similar to what CASQA has proposed is recommended.</p> <p>The development of a REAP for all Risk Level 2 and 3 projects 48 hours prior to every likely rain event is redundant; each REAP will provide the same checklist for site preparation prior to a rain event. Please modify requirement so that a REAP may be prepared at the start of a phase of construction and implemented prior to every likely rain event.</p>
11. Receiving Water Monitoring	Attachment B throughout	<p>The Draft Permit seems to assume that construction sites discharge directly to creeks. Many or most construction sites discharge to municipal systems that co-mingle flows. Those flows may not be accessible for a considerable distance downstream, by which point the total flow would not accurately represent the runoff from the site. Sampling farther downstream or at the ultimate outfall point would be meaningless in cases where other flows combine with it. Results from receiving waters would be similarly if not more seriously confounded.</p> <p>The required sampling will be expensive without a clear indication of environmental benefit. The collection of storm samples can also be exceedingly dangerous, even in relatively minor storms. The Draft Permit makes exceptions only in the case of</p>

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Draft Permit Element	Location	Comment
		<p>dangerous weather conditions such as flooding and electrical storms. The cost and safety risks are additional reasons that Receiving Water Monitoring is impractical for this Permit.</p> <p>San José recommends the monitoring requirements of this permit be directly related to construction sites, and that the Water Board's objectives for receiving water monitoring be redirected through a separate, comprehensive program.</p>
12. Effluent Monitoring	Attachment B Table 3	<p>Effluent monitoring as required by the Draft Permit will be extremely expensive and time consuming, particularly for linear projects. Linear projects can be very large, and may have hundreds of discharge points. Monitoring of all discharge points would be overly burdensome and so expensive that the potential water quality benefit is not commensurate.</p>
13. Risk Level 3 Monitoring	Fact Sheet p.32-37 & Attachment B	<p>Risk Level 3 project sampling frequency is unnecessarily high and required in the receiving water for all storms (Category 3) and if the NEL is violated (Category 2) – this does not appear to provide sufficiently useful information for assessing site compliance to justify the additional expense.</p>
14. Turbidity Sampling	Fact Sheet p.32-37 & Attachment B	<p>Turbidity sampling in the field can be inaccurate for a number of reasons, some of which do not relate to activities on the construction site. Stepped-up activities based on turbidity measurements should not be based on single measurements. If a turbidity threshold is exceeded, additional or more frequent turbidity testing should be required before triggering activities such as measurement of SSC.</p>
15. Bioassessment	Attachment B p.5, 10 & 12	<p>Macroinvertebrate bioassessment is an integrative tool and may not reflect impacts due to project activity, but other stressors in the watershed. Bioassessment should be used in a watershed context in conjunction with other tools to assess the condition of a water body. Moreover, if a degraded benthic invertebrate community was found at a particular location, there is no way to assess causality since most projects would discharge to the storm sewer system which combines many flows into a single discharge point at the stream. Additionally, this requirement will multiply costs for linear construction projects due to discharges to multiple receiving waters.</p>

**Attachment A
City of San José Detailed Comments on Draft Construction General Permit**

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		<p>In Table 5 in Attachment B dischargers are directed to utilize the CA Wadable Stream method for sampling of benthic macroinvertebrate bioassessment (BMI), however in Section H.12 of Attachment B it also says to refer to the Surface Water Ambient Monitoring Program (SWAMP) Quality Assurance Management Plan for more information on sampling collection and analysis. There is a major difference in work involved and the cost between the CA Wadable Stream method and the SWAMP Method (the CA Wadable Stream method typically takes about 2 hours of field work for one biologist to perform sample collection, while the SWAMP method can take anywhere from 4-6 hours, with two or three biologists to perform). The Draft Permit does not specify which method of sampling would be required. The Permit also fails to specify what level (Level 1 or Level 2) of lab analysis/identification is required for BMI assessment, and there is a significant cost difference.</p>
16. ATTS Toxicity Testing	Attachment B p.7	<p>San José continues to recommend that such monitoring be conducted outside the permit as a comprehensive, programmatic effort. ATTS use requires toxicity testing. This appears to be a poor use of resources. The Board, rather than having all dischargers in the state sample continuously, should certify coagulants as 'safe' if they have been adequately tested. Requirements for toxicity testing should be eliminated and replaced by documentation to demonstrate proper operation and maintenance of the ATTS.</p>
17. Visual Monitoring/Inspection	Attachment B p.2-3	<p>Since weekly BMP inspection is required for all risk levels, the pre-rain event inspection requirement is duplicative and does not provide substantial, additional water quality benefit. We recommend eliminating pre-rain event inspection requirements. If pre-rain event inspection requirements are kept in the Permit, please define a qualifying event using the REAP trigger.</p>
18. Watershed Monitoring Option	Attachment B p.14	<p>Section K states that: "If a discharger is part of a qualified regional watershed-based monitoring program the discharger may be eligible for relief from Sections E and F above." The Permit provides no direction on how a watershed-based monitoring program would be qualified and what participation would be required of the project RP to gain Regional Water Board approval. San José again recommends that this</p>

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19. Cost of Monitoring	Fact Sheet p.52	<p>objective is best addressed outside the Permit in a comprehensive programmatic effort. The Draft Permit estimates that monitoring compliance will cost approximately \$1,000 per construction site. The permit accounts for rental or purchase of a pH meter and a turbidity meter. This is a gross underestimate because it neglects to take into account labor for effluent monitoring, receiving water monitoring, soil particle size analysis, cost for benthic macroinvertebrate analysis, back up equipment, maintenance and calibration of equipment, procedure development, and staff training and certification.</p>
20. Numeric Effluent Limits (NELs)	Fact Sheet p.50	<p>While the City supports the intent of enhancing stormwater quality management through new, scientifically sound methodologies, the City does not support a NEL for construction site discharges as proposed in the Draft Permit. There is not sufficient and consistent data (for either receiving water or construction site discharges) to derive and establish numeric limits for turbidity or pH.</p> <p>It does not appear that the recommendations and concerns of the Blue Ribbon Panel regarding NELs have been considered. For example, how does the draft permit account for the recommendation that the implementation of numeric limits should be phased commensurate with the capacity of the dischargers and support industry to respond? Additionally, how does the draft permit consider the site's climate region, soil condition, and slopes, and natural background conditions (e.g. vegetative cover) as appropriate and as data is available? San José recommends that the Panel's concerns be addressed and that numeric limits be considered as a phased approach with limits that are tested, scientifically-sound, and within the capacity of dischargers.</p> <p>Until fully developed and defensible methodologies in accordance with USEPA protocols are available for NELs, the Permit should continue to emphasize the iterative BMP-based approach to demonstrating Permit compliance.</p>
21. NALs Violation Report	Attachment B p.15	<p>What is the purpose of submitting NAL violation reports? If this information will not be of immediate use to the regulatory agencies, then we suggest that this information be included in the annual report.</p>
22. Active Treatment System (ATS)	Attachment E	<p>ATS requirements in the Draft Permit could be impracticable and without clear water</p>

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Requirements		quality benefit commensurate with the cost. The Draft Permit language states, "The ATS shall be designed to capture and treat a volume equivalent to the runoff from a 10-year, 24-hour storm event in a 72-hour period with a runoff coefficient of 1.0". This is a difficult requirement to meet from a discharge perspective. In the San José area, the volume from a 10 year storm would be about 4 inches, over a 10 acre site, this represents a volume of 3.3 ac-ft to store. An ATS system would be required to discharge at a rate of about 0.5 cfs or 250 gpm to meet the 72 hr requirement. This is a relatively high flow rate with an estimated <i>per event</i> treatment cost of about \$2,500.
23. Final Stabilization/Cover	Permit XI.3	The Draft Permit requires that projects in Risk Category 3 provide a cover for all disturbed inactive areas that generally exceeds the effectiveness of most if not all known materials and it is unclear what would satisfy this requirement other than non-native grass sod.
24. Authorized non-storm water discharges	Permit VI.8	Is it the intent of the Water Board to require dechlorination of all potable water discharges? City of San José potable water is chlorinated and would require dechlorination to comply with Permit.
25. Reporting	Fact Sheet p.38	While the City supports the inclusion of more clear, annual reporting requirements, we recommend that the new Permit retain the current annual reporting schedule.